SUPREME COURT, U. S.

JUL 10 1968

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1967

No. 857

JAMES MILLER, a/k/a FRANK JAMES COPPOLA
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that this Court grant rehearing of its order of June 17, 1968, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed November 24, 1967.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. On June 11, 1968, this Court granted the petition for certiorari in *Leary v. United States* (No. 1365, 36 L. Wk. 3469), wherein the constitutionality of the presumption under

21 U.S.C. §176a was challenged. Since this was squarely raised as question number three in the above petition, it would be unjust to send the petitioner herein to prison while this Court is considering the same issue he raised several months before petitioner Leary. Moreover, since the validity of §176a is of substantial consequence in the administration of criminal justice, a second brief on the matter developed from a different perspective would surely assist the Court in resolving the issue.

2. On March 19, 1968, this Court held in *Simmons v. United States* (36 L. Wk. 4277), for the first time, that unfairly suggestive use of photographs in obtaining identifications from eye witnesses may deny due process of law or require reversal of a federal conviction in the exercise of this Court's supervisory authority. There was such unfairly suggestive influence in this case and it was complained of under the fifth question presented in the petition. Since it was labelled only as "basic unfairness," however, the Court presumably overlooked the point, which was elaborated on pp. 25-27 of the petition and pp. 14-15 of the reply brief.

3. The United States Attorney moved, in the above entitled case, to have petitioner committed to prison on June 24, 1968 or as soon thereafter as Mr. Justice Harlan should deny petitioner's application for suspension of the order denying certiorari in the above entitled case. Petitioner opposed the motion and moved for stay of execution, on eight separate grounds, including the facts that: (1) the defense had discovered on May 15, 1968, that the prosecution had hypnotized its chief eye witness prior to trial and had not disclosed that fact prior to, during, or after trial, though subsequently acknowledging the fact by letter of June 7, 1968; (2) on the same date, the

defense learned that the eye witness, Mike Caron, was so disturbed prior to trial, while in prison and subject to interrogation, that he attempted suicide; (3) newly discovered evidence, in the form of expert psychiatric opinion, indicates that Caron's credibility was cast into considerable doubt by the emotional upsets, the suicidal disposition, the sensory deprivations, and the hypnosis, none of which were revealed prior to or during trial. *Cf. Giles v. Maryland*, 386 U.S. 66 (1967); 18 U.S.C. §3500; (4) the defense recently discovered evidence, from witnesses whose statements have been recorded and who express their willingness to testify, which conclusively shows that petitioner is innocent of the crime of which he was convicted. All the foregoing evidence was submitted to the trial court in support of the application for stay on June 24, 1968. The trial court's response (similar to its attitude toward the jury threats, see Petitioner's Supplemental Memorandum in Support of Petition for Certiorari) was that petitioner had had a jury trial, the jury convicted him, and that was that. Petitioner's motion for stay was denied and the Government's motion granted.

It is submitted that while the foregoing evidence is not part of the record below (it is contained, however, in applications for suspension of the order denying certiorari, on deposit with the clerk of this Court), it gives color, meaning, and context to the claims made in the petition, especially those in point five thereof, and that this Court, recognizing the injustice done to petitioner and the irreparable harm to petitioner and to the cause of justice that a further trip through the courts will require, should grant the petition for certiorari and rule upon the claims made in the petition.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiori, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

STEVEN DUKE
W. PAUL FLYNN
RICHARD H. SIMONS
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

W. Paul Flynn

CERTIFICATE OF SERVICE

I hereby certify that five (5) copies of the foregoing Petition for Rehearing were mailed to the Solicitor General of the U.S. on July 9, 1968.

W. Paul Flynn